United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1037

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN CAPRA,

Defendant-Appellant.

On Appeal from Judgment of Conviction from the United States District Court for the Southern District of New York

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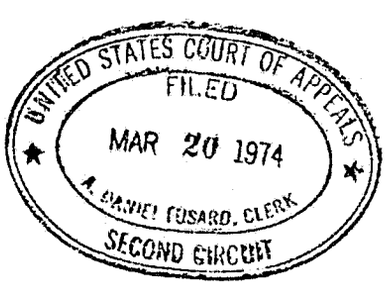
BRIEF OF APPELLANT JOHN CAPRA



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STATEMENT OF THE ISSUES

1. Whether the action of the government resulting in massive and lurid publicity in this case mandates that the convictions herein should be reversed?
2. Should the Court have dismissed the indictment against the defendant Capra due to his "discovery" as a result of the illegal intrusion by the police; or alternatively should his conversations been suppressed - together with all leads garnered therefrom?
3. Was the evidence seized in Toledo, Ohio a product of State action and therefore, suppressible?
4. Was the defendant so prejudiced during the trial that his due process rights were violated in this total proceeding?

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered against appellant in the United States District Court for the Southern District of New York (Frankel, J.) on January 3, 1974, convicting appellant of conspiracy with regard to narcotic drugs - 26 U.S.C. 4705(a), 7237(b), 21 U.S.C. 812, 841(a)(1), 841(b)(1), and of two substantive order form violations and of two substantive possession-distribution violations. The defendant Capra was sentenced to a total maximum term of eighteen years, together with a special parole term of six years, and in addition, a fine of $45,000.

STATEMENT

CAPRA DISCOVERY, WARRANTLESS LISTENING AND NON-MINIMINIZATION

The statement of facts that follows sets forth only such relevant facts as will sufficiently place in their setting the questions presented in this appeal. We adopt and incorporate any such other facts as presented to this Court by the other appellants.

On December 19, 1971, Detective George Eaton who was located in the vicinity of the Diane Bar listening to a wiretap at the aforementioned establishment "suddenly discovered" that he had been listening to the wrong party (MH922)*.

As a result thereof, the Detective immediately called his superior, Lieutenant Hill and indicated to him that he was intercepting the wrong individual. (MH923-924).

Detective Eaton was told to contact Assistant District Attorney Fishman for further orders. (MH925).

On the next day Detective Eaton met with Assistant District Attorney Fishman and indicated to him that he had been listening to an individual by the name of Steve "Beansy" and not Joseph DellaValle. (MH924).

It is to be remembered that Detective Eaton was told and understood that he was only to intercept the conversations of Joseph DellaValle as so directed. (MH749).

Mr. Fishman instructed him to continue to listen to the conversations of the individual "Beansy" in order to attempt to ascertain his identity, so that he could be able to amend the court order. (MH925, 753-756).

The aforementioned eavesdropping warrant for the conversations of Joseph DellaValle was to expire on January 6, 1972.

*Minutes of the Pretrial hearing are referred to herein as "MH".

And it was on that day that Assistant District Attorney Fishman presented a new affidavit, together with a request for a renewal of the eavesdropping warrant regarding the public phone at the Diane Bar, together with an amendment authorizing the eavesdropping of an individual by the name of Steven "Beansy" DellaCava. (MH763, 803-804).

Assistant District Attorney Fishman testified that he was new at supervising eavesdropping warrants, but he was aware that he could only authorize surveillance as to Joseph DellaValle.

> "Q. You had authority on December 8, to only listen to Joseph DellaValle with others, is that correct?
>
> A. That is what the order says." (MH811).

Assistant District Attorney Fishman explained on cross examination that he was unable to obtain an amendment to the existing eavesdropping warrant for the Diane Bar earlier than its expiration for a multitude of reasons, including the fact that he was on trial, had to do the typing himself, was interrupted by the Christmas-New Year vacation, had personal commitments, and was conferring with other members of the New York County District Attorney's office. (MH814). However, he reiterated that in the interim he told the Detectives to continue listening even though he knew they were not authorized to listen to anyone but Joseph DellaValle. (MH814). On the very date that the eavesdropping warrant was to expire, Assistant District Attorney Fishman was able to place before the court a request for a renewal, together with the "Beansy" amendment. (MH890-892).

Assistant District Attorney Fishman testified that he knew well and understood on the 20th that he was under an obligation to get an amendment to the existing eavesdropping warrant. (MH891).

However, from December 20th on, Detective Eaton, fully well knowing he was listening to an individual not authorized to be overheard, continued to listen to "Beansy". (MH925, 1013-1014). On December 23, 1971, officer Eaton, while listening to the phone conversations of Steve "Beansy" overheard him place a call to the Bronx in which he asked for "Johnny Hooks or Leo". The woman who answered the phone said, "just a moment" and left the phone. Thereafter, there was a lengthy interval until such time as a male voice responded to Mr. DellaCava's phone call. (MH926). This male was ultimately shown to be that of John Capra. (MH1095, 1120, 1186-1189). Detective Eaton as a result of that phone call observed the Diane Bar and testified that his surveillance led him to a conclusion whereby he was able to pick out an individual who ultimately was shown to be Steve "Beansy" DellaCava. (MH1123).

The Detective testified that he followed Mr. DellaCava uptown to "Ray's Stationery Store". He then alleged that he observed DellaCava enter what appeared to be a meat market and proceed from there to the trunk of an automobile and placed a package in the trunk of the aforementioned car. (1123-1129).

As a result of that conversation, together with the following surveillance, Detective Eaton commenced an investigation into an individual by the name of Johnny Hooks. Detective Eaton testified that until December 23, 1973, he had not heard of nor known of Johnny Hooks nor John Capra, and that only as a result of that phone call

did an investigation commence with regard to John Capra. (MH1095, 1120, 1186-1189).

Therefore, the initial identification of John Capra, the commencement of the investigation of John Capra was the result of the primary overheard on the Diane's Bar public phone which occurred on December 23, 1971.

At the hearing the following developed:

"Q. On December 23rd you overheard a conversation between Mr. DellaCava and my client, is that correct, my client being Mr. Capra?

A. Yes, that is correct.

Q. This was some four days after you had discovered that you were listening to the wrong party?

A. That is correct.

Q. And that conversation was one of the conversations played this morning by Mr. Feffer, in which Mr. DellaCava calls up and asks for Johnny Hooks or Leo, please, and there is a long pause?

A. That is correct...

Q. Do you recollect how long that call was from the inception to the end?

A. It could have been five minutes, it could have been up to eight, ten minutes. I don't know.

Q. Now, did you know that Joseph DellaValle at that time was not called Johnny Hooks or Leo?

A. Well, it never entered the picture, right. That's the first time I heard the name Johnny Hooks, ...

Q. Capra ...

A. Yes, John Capra.

Q. Now, after that phone call you did some surveillance?

A. That is correct...

Q. As a result of that phone call and surveillance you learned about my client, John Capra?

A. Eventually, yes.

Q. As a result of that you learned about a nickname Johnny Hooks?

A. Yes, that was in the conversation.

Q. And that conversation of John Hooks led you to John Capra, is that correct?

A. That's right." (MH1094-1096).*

It is further apparent that other police officers and agents were unaware of the existence of the defendant John Capra until the discovery by Detective Eaton on December 23, 1971. (MH77, 1066, 1210-1213, 1293)** Finally, in referring to this discovery of John Capra, Detective Eaton, in a subsequent affidavit requesting a wiretap indicates the following:

"During the course of late December ... evidence was uncovered which indicated that Steven DellaCava was acting in concert with Leo Luca Guarino, John Capra ... to possess, transport and sell narcotics ..."***

Due to the observations and leads furnished as a result of the original December 23, 1971 conversation, Detective Eaton received authorization on January 6, 1972 to intercept the phone calls of Steven DellaCava.

Due to the observations and leads furnished as a result of the Diane's Bar overheards, Eaton opinioned "that John Capra is the co-conspirator of DellaCava"; and he specifically reached that conclusion from - (a) phone calls between Capra and DellaCave received as a result of the Diane Bar wiretaps; and (b) a journey by DellaCava

*Page numbers refer to the original record.
**Affidavit for wiretap of the public phone at Ray's Stationery Store

to a social club at 3203 Westchester Avenue (the aforementioned meat market) "... which Capra is believed to use as a center of operations ..." - he details that the first such journey occurred on December 23, 1971, A FACT RECEIVED as a result of the overheard of December 23, 1971. (MH1120-1129).

Counsel for Capra indicated to the Court in his suppression motion that the conversation of December 23, 1971 was referred to by Detective Eaton in affidavits commencing with the January 6, 1972 request for an extension and amendment and running through eleven affidavits completed with Detective Eaton's affidavit of March 20, 1973, for an extension of a "bug" at Whitestone, Queens. (Motion - dated September 5, 1973).

It was contended on behalf of the defendant Capra that "...all evidence against the defendant (Capra) is inadmissible because it is the product of an unlawful act and obtained through the exploitation of an unlawful act." - referring to the December 23, 1971 overheard. Counsel continued in his affidavit of September 5, 1973:

> "Conversations between unknown parties specifically unauthorized* and having no basis for the uninvited ear of the police were listened to, logged and transcribed.

A further conversation of December 29, 1973, between DellaCava and Capra was listened to, logged and transcribed by Detective Eaton and also played for the jury (2170-2256).

During the course of the trial many conversations intercepted pursuant to what was to become known as the Diane's Bar "1" and the Diane's Bar "2" eavesdropping warrants between DellaCava and Capra were played to the jury.** (2170-2256; Government's Exhibit "75").

*As was the conversation of December 23, 1972.

**Diane's "1" eavesdropping warrant refers to the warrant of December 8, 1971 through January 6, 1972; Diane's Bar eavesdropping warrant "2" refers to the order of January 6, 1972 through February 4, 1972 - annexed as Exhibits "A" and "B" to Capra's motion to supress of September 5, 1973

The prosecution in its summation made much of the conversations between DellaCava and Capra. (3880-3885).

It was contended on behalf of the defendants that it was totally improper for the police to monitor the conversations of DellaCava initially - especially in view of the fact that a public phone was being intruded upon and that the police officer who obtained the search warrant was not fully cognizant of the voice of the subject whom he belived he had the right only to listen to. (MH1013-1014).

Not only was Detective Eaton unsure and indicated that he had difficulty recognizing the DellaValle voice, but none of the other monitoring agents had ever heard the voice of DellaValle before. It was further noted that there were conversations at the DellaValle household in which unquestionably DellaValle was a party to and that at the same time, or within a reasonable time surrounding the DellaValle home conversations, the monitoring agents of the Diane Bar were listening to DellaCava. A fact easily discovered as a result of the testimony of Detective Eaton that logs were compared between the DellaValle home conversations and the Diane Bar conversations. (MH994-5, 1021-1028, 1044). At the very minimum, it was argued that improper police action was combined with at a minimum the gross negligence of the police in not discovering that they were listening to a party whom they were not authorized to listen to.

Nevertheless, Capra's counsel further argued that as a result of the fact that there was a discovery by the chief monitoring agent that he was listening to the wrong party on December 19, 1971, that he had no right to continue to listen to Steve"Beansy" and that the District Attorney's office should have moved to immediately obtain

an amendment rather than allowing such an interval of time to pass.

It was further argued that especially in view of the fact that Detective Eaton knew he was not about to listen to a conversation between DellaCava and DellaValle, but rather between DellaCava and "Johnny Hooks or Leo" and that such a lengthy period of time passed between the request and the individual who appeared on the phone - he had an ample opportunity to stop listening and "minimize":

> "... - DellaCava asked for Johnny Hooks. A woman answering the phone says, "just a moment", goes next door and then Capra gets on the telephone. There is no reason for the police to have maintained this tape for this period of time, knowing that not one of the parties involved was DellaValle - after listening to the prologue of the conversation and hearing the voices, knowing that DellaValle was not part of that conversation". (Capra's counsel's affidavit of September 5, 1973, at p. 28.).

Detective Eaton specifically testified:

> "I left his (Fishman's) office thinking I could only intercept the conversations of Joseph DellaValle"...
>
> "Try to determine who the person is on the phone. If it is not the subject, turn it off, turn off the machine.
>
> Q. In other words, if it is not Joseph DellaValle, turn the machine off?
>
> A. That is correct. (MH907-908)*.

Conclusively showing the initial discovery Detective Eaton indicated the following:

* It is interesting to note that on a prior occasion Detective Eaton was given the same instructions by another Assistant District Attorney with regard to another case.

> "Q. And did he tell you that if you had any doubts with regard to the named party being heard you would have shut it off?
>
> A. That is correct". (MH957; See also MH1002-1003 (1005-1006; 1097; 1132-1133; 1172-1173; 1175); 1011-1016; 1040; 1042.

Q. Approximately how long has Mr. DellaCava been under surveillance by members of your group and the Federal Bureau of Narcotics and Dangerous Drugs?

A. How long?

Q. Yes, since when?

A. December 23, 1971". (MH945, 926-930).

Detective Eaton's state of mind was spread on the record:

"Q. And you knew that you had to go through some judicial process to get another name, Beansy, on an order in order to listen to him, is that correct?

A. That is correct, yes.

Q. Now, you always knew at that time that if you didn't know Beansy's full name, that the court could grant you an order if you asked for a wiretap of an individual by the name or known to you as Beansy, also known as Steve, is that correct?

A. That's not exactly correct. The District Attorney's office would prefer to have a positive identification of a guy before they put a wiretap on him.

Q. You aren't familiar with the fact that you do not have to have a positive identification? As a matter of fact, you have worked on wires in the past where nicknames were used to identify the individuals?

A. I have.

Q. You are familiar with the fact that court orders were registered and issued based upon a nicknamed, is that correct?

A. That's correct.

Q. Isn't it a matter of fact you knew at that point if you went in you could present the District Attorney with the name of Beansy, also known as Steve or visa versa? Is that correct?

A. That's correct.

Q. And you didn't know his last name, is that correct?

A. That's correct.

Q. And you didn't know his last name, is that correct?

A. It was done in only one case that I know of, I think.

Q. Well, at that time you only worked on three prior wiretaps, is that correct?

A. That is correct.

Q. So in one out of three was done?

A. I know what you have to go through to get a wiretap, counsel...". (MH1085-1086).

The court found that the defendants had proper standing with regard to the minimization hearing and also to the motion to suppress which was heard as one hearing. (MH500-538).

The court stated (MH511):

"It strikes me that for this kind of threshold question where there is the delicacy of privileges and possible incrimination, a plausible claim of ownership may well be enough since we have certain Fourth Amendment Interest that we care about any way. Why should I have to try this out instead of just taking this sort of prima facie case in and say it shows enough of an interest, to show whether the Fourth Amendment has been neglected here ... I will find that sufficient to give them standing under the doctrine of this case ... I am worried primarily about the Fourth Amendment ... I'll take that and try out the privacy problem ... I said I am going to hear the motion to suppress ... I'm not going to subdivide this motion to suppress. I think, though we have a fancy new word for it, minimization, essentially we are hearing a Fourth Amendment type motion. We are hearing a motion to suppress evidence as obtained in violation of Fourth Amendment rights. (MH511, 513, 519, and 526; See also MH500-538; MH1136, 1152).

DISSEMINATION OF PUBLICITY

Pursuant to a motion to suppress a statement allegedly made by the defendant John Capra, a hearing was held and the govern-

ment called Bernard Gallespie, a sergeant in the New York City Police Department. (MH281). Sergeant Gallespie outlined the various procedures that occurred prior to the arrest of the defendant John Capra, together with what occurred at the Capra household and detailed his arrest. (MH281-293). He detailed the fact that he was told to report in an auditorium at West 57th Street and when he arrived there, observed a congregation of fellow officers and investigators. It was his best recollection that at the time he arrived, Commissioner McCarthy was addressing the group.* He further testified that he had seen the head of the narcotics division, several others and various directors of the BNDD. (MH281-290).

On cross examination, Sergeant Gallespie suddenly indicated that the Capra arrest party not only contained himself and another New York City Police Detective, but that he had with him the Deputy Commissioner of Public Relations, Mr. Kellerman and Mr. Kirkman from the Daily News. (MH292-293).

* We were all later to learn that this entire congregation was covered by the media - as a matter of fact a photograph of Deputy Commissioner William McCarthy briefing lawmen which also displayed the presence of the Chief Narcotics Prosecutor for the United States Attorney's office appeared in the Daily News (Exhibit "H") for identification of the hearing of September 19, 1973. Furthermore, The New York Times of April 17, 1973 carried a lead story on Page 1, written by John Corry, who attended the briefing session and observed "during the arrest and raids. "The front page carried a picture, without credit, which depicted a raiding party, with rifles and equipment for breaking down doors beseiz(ing) a Bronx apartment" - counsel alleged that this photograph may have been disseminated by a government photographer and requested that it be the subject of further court inquiry. These, and other exhibits detailing the fact that the mass media was present during the pre-arrest stages and was aided by the government in the dissemination of news regarding this "raid" were attached to counsel's letter of December 24, 1973 and placed before the court as exhibits with regard to Capra's request that the conviction be set aside, or alternatively that he be given a plenary hearing in connection with the publicity generated by this indictment through the efforts and/or consent of the government.

He continued by stating:

"A. Let's see, I had a Deputy Commissioner of Public Relations, Mr. Kellerman, and Mr. Kirkman from the Daily News.

Q. They left with you for the purpose of arresting Mr. Capra. Is that correct?

A. I don't know what their purpose was for being with me, but they were observers.

Q. Did you ask the man from the Daily News what he was doing there?

A. No.

Q. Did anybody explain to you what the man from the Daily News was doing there?

A. No. The head of the Narcotics Division told me that Mr. Kellerman and Mr. Kirkman would be along for the arrest.

Q. Now is Mr. Kellerman a police officer to your knowledge?

A. No, sir...

Q. His job is to run the publicity for the New York City Police Department. Is that correct?

A. Yes...

Q. And the publicity man and the Daily News reporter were driving the automobile with you. Is that correct?

A. They were passengers in the automobile.

Q. So, again, I ask the question, you were aiding him in obtaining the story for the Daily News?

A. Yes...

A. It was understood that it was a joint operation, so it would be best if both city and federal people be

Q. Including the New York Daily News?

A. Yes, sir. Well, they are with us, so they're there...

Q. By the way, by about one o'clock did anybody appear with a camera?

A. Persons had been present with a camera in their automobile". (MH292-299).

Sergeant Gallespie continued by indicating that a writer for the New York Magazine, a photographer for The New York Times were also in the area outside the Capra household. (MH299). After Sergeant Gallespie had indicated the presence of the members of the mass media, counsel indicated to the court that it was his prior understanding that the camera man and other individuals surrounding the Capra household on the night of the arrest were members of the BNDD: (MH300). Capra's counsel indicated his new concern about the fact that there was great publicity attendant to the arrest of Capra and the mass arrests and the various raids that occurred on the evening of April 13, 1973. Counsel specifically stated:

"My concern is as to ... Mr. Capra's rights, which was to be arrested without this type of publicity. Again, as I indicate to Your Honor, I have not raised that issue. However, I am very concerned about the fact that there was a New York Magazine, a New York Times man, a Daily News man, various other people from the media brought there by the Police Department.

I think that they have exceeded the bounds of propriety". (MH303).

The record at this point is totally complete that Capra's counsel had no idea, nor dare say that anyone with regard to the defense of this matter know that the mass media were brought to the

Capra household by and under the auspices of the New York City Police Department and the Drug Enforcement Administration. Capra's counsel further indicated:

> "As has been suggested by other counsel, there is an issue at this point now of harassment, provocation, the propriety of the arrest. The police brought these people there... I would also like to find out, because again, the novelty of the issue is not the publicity issue but the propriety of the police and agents exhibiting this type of conduct. Somewhere in the back of my mind it suggests to me that there is some sort of violation of his rights to have this thing occur.
>
> I never, in my wildest dreams, and I say this in good faith before the court, believed that the police would ferret around with them photographers from the Daily News taking pictures of an arrest. I don't know where they were stationed. I know there was a photographer outside his home. As he walked out a picture was taken and he was told that that's an agent ...
>
> MR. SLOTNICK: The government is stipulating there was a blaze of publicity which was caused by the police in notifying and carrying reporters with them?
>
> THE COURT: I don't know about the word "caused", but "aided" or "cooperated". Is that stipulated too?
>
> MR. FEFFER: It is stipulated at the time of Capra's arrest there were newsmen present, photographers were there, pictures taken and there was a blaze of publicity surrounding his arrest. (MH304-308).

Sergeant Gallespie further indicated that during his appearance in the Capra household on April 13th he knew of the presence of news media people and public relations people inside the Capra household. (MH309).

"Q. When you went downstairs, who was present?

A. I believe Mr. Kellerman, Mr. Kirkman, I believe Mr. Santangelo* had come upstairs, followed me up ...". (MH316).

After Mr. Capra was arrested, he was taken to the vehicle of Sergeant Gallespie and driven down to the main offices of the Drug Enforcement Administration at 57th Street, together with Mr. Kirkman of the Daily News.

"MR. SLOTNICK: Your Honor, I would like to go into the area of why Mr. Kirkman was sitting in the automobile, the possible fact that Mr. Capra would make a statement or perhaps statements would be taken from Mr. Capra by a civilian newspaper man. I find it totally unbelievable why he would be in the automobile for any reason other than obtaining the story... I'm saying that it flows, it shows the motivation, it shows an intent, a purpose. Certainly one can gather, or I can gather two things from his presence." (MH320, see also 321).

Robert Allen, an agent of the Drug Enforcement Administration further testified that he was part of the arresting party assigned to arrest Mr. Capra. (MH426-427). He testified that he left the conference room**with special agent Sokel and several members of the press, and that he not only spent the evening prepared to arrest Mr. Capra or aid in such, but was also chauffeuring two members of the media. (MH435-437). Agent Allen proceeded to the vicinity of the Capra household with agent Sokel and his two invited guests. (MH445-446).

What ultimately resulted was the "massive and lurid publicity" that the Trial Judge so well condemned in the "Memorandum on Pretrial Publicity" issued by the Trial Judge on January 8, 1974.

*The aforementioned automobile was in the use and paid for by the United States Government. (MH330).
**Containing several hundred people.

Agent Allen identified the photograph which appeared on the front page of the Daily News and entered as Exhibit "E" on the hearing*. The photograph which covered one-half of the front page of the Daily News had hugh bold headlines "INDICT 86 AS BIG DOPE DEALERS". Underneath that headline appeared a large picture of the defendant Capra being taken from "his opulent home"... to Manhattan during weekend roundup of suspected major narcotic dealers". Agent Allen identified Detective Gallespie, special agent Sokel, Detective DeMarco, defendant Capra and himself as being portrayed by the photograph. (MH450-452). He further identified the pressmen that he "was told ... would be assigned to our four-man team". It was his recollection that one gentleman was from the New York Magazine and the other from the Daily News**(MH455-456). Agent Allen admitted that the pressmen had been with him in his automobile from the moment he left "the auditorium" to the Capra household and back to the headquarters of the Drug Enforcement Administration. (MH456).

Subsequent to the testimony of Agent Allen, counsel once again mentioned to the court "the great improprieties with regard to the arrest" indicating that not only "the press" procedure, but the mass arrest procedure was extremely disturbing.

> "I just don't like, being a member of this bar, the mass arrest, the keeping of defendants incommunicado for a period of time. In this case, at least one witness indicated it was at least twenty-four hours, possibly longer, and the witness being an attorney". (MH494).

*Further presented to the court and annexed to counsel's letter of December 24, 1973 in which a request that the conviction be set aside, or alternatively that a hearing be granted was made to the Trial Judge.

**He testified that the Daily News man had a camera.

The massive publicity that accompanied the arrest of John Capra contained facts in the news articles which were only known to the prosecution and were released prior to the defendant Capra's arraignment. The Daily News of April 17, 1973, pages 1 and 3, (Exhibits "E" and "F", hearings of September 19, 1973), depicted John Capra being led from his home after arrest and the story by Edward Kirkman began:*

> "(a) An electric bug planted over a year ago in an east Harlem bar led yesterday to the indictment of 86 persons as major drug dealers, charged with supplying a large portion of the heroine and cocaine in the Metropolitan area and as far west as Detroit...
>
> Among the top figures arrested on conspiracy charges ... John (Johnny Hooks) Capra, 33, ... reportedly have overseas drug connections..." (Emphasis added).

The entry by reporter Kirkman into the Capra home with the arresting agents resulted in another story carried on page 3 of the Daily News, which, in vivid terms, described the furnishings inside the house and carried alleged statements "of what Capra's wife said to the agents.

The New York Post of April 16, 1973, reported the arrest as a result of the news conference held by the United States Attorney on the morning of that day. In his communication to the Court of December 24, 1973, counsel wrote referring to the New York Post article:

> "Statements of that press conference are annexed hereto as Exhibit "B" and are astounding as well as highly prejudicial and beyond the bounds of fair comment with regard to this case" - at p. 4.

Counsel outlined other instances of Pretrial Publicity in asking that the court exercise its supervisory power to insure proper standards for federal criminal justice.

*Defendant Guarino was depicted as he was brought to the offices of the Drug Enforcement Administration. At. P. 3 thereof.

"1. A few days after the arrest, there was television coverage by Geraldo Rivera, of ABC's Eye Witness News of the actual execution of a search warrant for Diane's Bar. Part of the search conducted by BNDD agents was televised and the BNDD agents' comments were carried. It was reported that a white powder was found and that "traps" existed which could be used to store heroine"...

3. Some time after the arrest of Capra, the arresting officer, Gallespie, was interviewed on the television show carried by Manhattan Cable T.V. concerning the arrest and the investigation"*

The publicity continued on and invaded the trial (391-431; See also Court Exhibit "2"). Counsel moved for a mistrial based upon that article. (403). Four jurors admitted to reading the article. As each juror was questioned, he commented that there was a recognizable quality about the devastating news story. In fact, one juror commented that the article was "similar" to the proceedings at hand. (422). Subsequent to the questioning of the jurors, all counsel moved for a mistrial. (430-431).

Again, towards the end of the trial, an article appeared in the New York Magazine (Court Exhibit "4") which was found on the front page cover of the magazine and substanstantially into the magazine. Counsel objected and indicated to the Court that the article discussed the indictment of some 91 suspected narcotic dealers during the past April with regard to federal drug conspiracy cases. Counsel further indicated to the Court the similarity of events in the article as to events that occurred at trial. (3080). The Court was told that the aforementioned story contained photographs which were government property and not public record, and were apparently released by some

*The articles counsel refer to were appended to his letter of December 24, 1973 and docketed for the perusal of this Court

governmental agency. The article further contained interviews with people in law enforcement, including those connected with this case. (3081).

The symmetry and similarity with the case on trial was pressed by Capra's counsel.

> "If you blank out the name, you could probably have a transcript of this trial as being rather similar. I would indicate to you that at least, or at most I make a motion for a mistrial based upon the facts in this article released at this unfortunate and inopportuned time". (3082).

It was further requested that the Court grant a mistrial based upon its discretionary and supervisory power and "that the government should be sanctioned for their activities that run throughout this case.

> "If Your Honor will recollect, during the course of the pretrial hearings, we learned, at least I learned for the first time that a courier from the Daily News was being brought about to historically record the arrest of my client, which ultimately resulted in the front page of the Daily News...". (3083-3084).

Counsel pursued what he considered to be "the sanction" that should be placed against the government for one, allowing that occurrence to occur, combined with the occurrence of the New York Magazine.

> "I think the interviews are ill-timed, I think the story is ill-timed, I think the dissemination of information by the government until these some 91 or 81 cases have been completed is ill-timed, and I think that they can be sanctioned, and I think the Naphue Doctrine and various other doctrines as ennounciated by the United States Supreme Court and this Circuit are very, very applicable at this time, and based upon that, I ask for a dismissal. (3085).

The government indicated that most of the article contained matters of public record "except, of course, some of the interviews

that obviously took place with the detectives who were witnesses at the trial". (3087). The Court finalized the discussion by indicating:

> "If it should ever be the occasion for the exercise of the Court's supervisory power, we will consider that at some appropriate time". (3087).

It was finally conceded by the government that at least one of the individuals identified in the photograph, appearing at page 50 of the article was an individual who is depicted in another photograph at the trial of this case.

In an interesting twist, the government was to later indicate to the Court that defense counsels "are now bringing into the courtroom the individual centered in that article". (3306-3307). The government appear perplexed that one Moe Lentini was to be called as a witness for the defendants, especially in view of the New York Magazine article. Some time thereafter, defense counsel decided not to call Mr. Lentini after thought and consideration. (3458). It appears that the government's comments may have brought some thought to defense counsel in not calling the witness Lentini. (3459).

On November 27, 1973, subsequent to the jury verdict, Judge Frankel issued a memorandum in which he directed government counsel to respond to certain questions with regard to the publicity surrounding this case.

> "Among the many subjects touched in pretrial hearings and left for further consideration at a later time was the matter of pretrial arrangements for publicity attending the mass of arrests on the morning of April 13-14, 1973. There remains questions as to whether these activities should be grounds for remedial action of any kind

in the exercise of the Court's supervisory power over the business of law enforcement attending federal prosecutions".

Memorandum of November 27, 1973, at p. 1. Judge Frankel further commented:

> "Without limiting the scope of such submissions, the Court recalls that they will place before us in pretrial hearings some photographs of people being arrested, including some evidently being "posed" for photographers. It may be that materials of this kind will be appropriate for this or some higher court in considering the fairness and propriety of the proceedings leading to the convictions herein". id at p. 4.

The government responded to the aforementioned memorandum by directing a letter to the Trial Judge, dated December 12, 1973, and signed by an assistant who had alternatively tried the case and requested that this matter not be made an issue at this time:

> "...There is simply no need at this time for an inquiry to ascertain whether such publicity might have affected "the fairness and propriety of the proceedings leading to the convictions herein". (December 12, 1973 letter at p. 3 thereof.

Immediately on that day Judge Frankel replied:

> "In any event, as you yourself recognize, the Court has a concern in its supervisory capacity with Rule 8 of our Criminal Rules. Moreover, it is not possible to say certainly that the fairness of the trial or any other procedural matters to which you refer will necessarily and absolutely preclude the defendants in this case from taking any advantage for themselves of possible violations respecting the prohibition against improper publicity Cf. Mapp v. Ohio, 367 U.S. 643 (1961). On December 17, 1973, the government responded. On January 8, 1973, Judge

Frankel wrote the most complete "Memorandum on Pretrial Publicity". (App. A. 163-185). He detailed the facts concerning the publicity and commented upon the government's activities with regard to same.*

"The United States Attorney scarcly embraces the whole of the matter when he concludes in this case that this particular trial has not been demonstrated to have been vitiated by sorted publicity ... but the atmosphere in our principles are polluted if the indictment and arrest become the circuses they too often are, complete with prosecutors (press conferences and photographic spreads)." Id at p. 18-19.

Nevertheless, counsel's final motions for a hearing, or alternatively for a setting aside of the conviction were denied by the Court. (MS:22)** The court stated:

"I think its already been made clear that this Court does not view as trivial or insignificant the events surrounding the arrest that led to my memorandum.

I have written down some thoughts on this subject which I will try to get typed up and published in the next day or so for the guidance, I hope, of the people in law enforcement and perhaps the rest of us, that specifically on the motion, though I do not think it is frivilous, I concluded that it must be denied, and I do deny it...

I think it is, nevertheless, useful for us to have made this record. One of the reasons we have Appellate Courts is that we get the benefit of their detachment and their somewhat greater latitude in deal-creatively with the matter of supervising law enforcement, as well as supervising the lower courts, so all of the record will now be available for scrutiny on a higher level. At this level it does not serve to defeat these convictions or to warrant the dismissal of the indictment for which Mr. Slotnick and others have moved.

* Commented upon and related to in Point I of this brief
** MS refer to minutes of sentencing.

I also have not overlooked the application for an evidentiary hearing. I do not believe that the papers we have are sufficient to give a full and reliable account of the extent and character of the publicity attending that so-called roundup last April.

However, in the view I take of the problem directly before me, I am unable to conclude that a hearing of this nature is necessary or justified, and I do not intend, subject to being corrected later on, to hold such a hearing". (MS p. 4).

Immediately prior to sentencing the defendants, the Court indicated its great displeasure of what had occurred with regard to the continuing publicity in this case.*

* As referred to in counsel's letters of December 24, 1973 after the defendants were convicted and released to go home for Thanksgiving, there appeared a frenzy of articles and radio and television comments with regard to the fact that the defendants had gone home, including interviews by law enforcement. There then was a further article reproduced in Readers Digest regarding the defendant John Capra. After all that had been done with regard to the publicity aspect of the case the Court continued:

"I will simply say that I think it regrettable that the people in law enforcements, of whom I think there are many in this room, felt obliged to invite photographers to be with them while they valianty guarded these defendants on Thanksgiving Day, that the risk was not commensurate with the dramatic performance staged by the members of law enforcement operations ...". (MS71).

As a result of the defendant's release to spend Thanksgiving with his family, the news media did not desist in their reporting of the event and carried it as a major piece of news.

Photographs of law enforcement officials guarding the home of the defendant DellaCava appeared and large articles recounted all the sordid events.

The Readers Digest Article referred to the wiretaping that was involved and it appeared that it was gained through interviews with law enforcement officials connected with this case - especially Detective George Eaton.

THE TRIAL

Prior to the trial* the defendant Capra requested a severance, in that he indicated to the Court:

> "... the prejudice that would flow by a joinder of the co-defendants for trial together ...
>
> The trial will contain statements of co-defendants (Electronically recorded or otherwise) which would be of such a highly incriminating nature that no purpose could be served in causing the defendant Capra to stand trial together with all the co-defendants - other than to prejudice and further taint the government's case against the defendant Capra". (Application for such severance - September 5, 1973). Capra further complained that he believed there to be a severe Bruton problem, 391 U.S. 123 (1968) p. 50. He continued and stated that there was misjoinder as to the counts and the defendants.
>
> It is contended that the trial will involve several conspiracies, different jurisdictions and diverse issues, all which will deny the defendant Capra his due process rights to a fair hearing. Also, it was improper to join the defendants whereby testimony may come in alleging offenses committed by others not involving defendant Capra an outside the conspiracy". Id p. 51).

Capra further indicated to the Court that there was a taint issue raised by his trial and that there were many conflicts between and among the defendants, including the question of testimony, witnesses and theory which should mandate a severance.

This motion was denied as was subsequent motions for mistrial denied as a result of what Capra contended was the multitude of conspiracies. As early as the completion of the prosecutor's opening, Capra's counsel made the following objection:

* Application of Capra, September 5, 1973.

"I have always contended even at the early pretrial that the government would place before the jury a tremendous conspiracy that really were several conspiracies, and I was very concerned with the wording of Kotteakos as being prejudicial and would cause my client great problems before a jury and I renew that application". (27).

This application was denied, as was several others during the course of the trial.

The prosecutor's opening came true, as during the course of the trial there were a multitude of issues, a multitude of witnesses, and a multitude of evidence which Capra's counsel reflected to be a multitude of conspiracies. (9-25).

There was a multitude of testimony with regard to law enforcement officials who indicated that during the early period of time in question they had never known of Capra nor his alias. (77, 1066, 1210-1213, and 1293). The earliest discovery of Capra was apparently on December 23, 1973, as testified to by Detective Eaton in the pretrial hearing. (MH1094-1096).

The first witness called by the government was special agent Robert E. Johnson. (69) Special agent Johnson testified to his investigation of drugs coming into the Michigan area. (77). He was among those that had never heard of John Capra. (77-78). He testified that he was involved in the aforementioned investigation from February of 1970 through November of 1971. (77).

"Q. As a matter of fact, all during the period of time that you worked on this investigation you never heard nor did you know the name of John Capra, is that correct?

A. That is correct". (78).

His testimony set the stage for his surveillance and seizure of a half a kilo of heroin from Earl Simms at

the Detroit Airport. (74-76).

Earl Simms was to testify at the trial as a witness for the government. (1549-1698) and discuss his relationship and never once mentioned the name of Capra. Capra's counsel did not even cross examine Earl Simms before the jury.

Thomas S. Kostecki, a special agent with the Drug Enforcement Administration testified with regard to Earl Simms and George Harris and discussed the Detroit seizure. (107-114).
He testified that he was the partner of special agent Johnson and from January until April of 1971, they exchanged important information about the matters they were working on -he never mentioned Capra.
(126).

Subsequently thereto, Joaquin Ramos testified for several days and laid out what counsel considered to be the multitude of conspiracies.

He discussed a relationship with Marco Delgardo (not named as a co-conspirator). (142, 143, 147) and his various conversations with Mr. Delgardo which did not concern the defendant Capra. (197-198). He further testified to a relationship with an Alex Metro which appeared to have been consummated and destroyed within a short period of time. (152-156).

He also testified about a relationship with co-defendant Robert Jermain. (182-184).

He laid out a further situation concerning defendants Jermain and Harris, together with himself. (251, 253, 266-268). He discussed prior dealings that defendant Jermain had with Mr. Harris and related a conversation with regard thereto - none of which was proven to be connected to the defendant Capra. (793-794)* Photographs of Ramos and others at Madison Square Garden were distributed to the

* There was much testimony concerning the relationship of Jermain and Ramos which included an Allerton "fish market" and the record is clear that there is no relationship between Capra and the aforementioned fish market. (1031-1033)

jury as government's Exhibit "22" and "24". Capra's counsel objected, indicating that it was irrelevant as to his client and should not be entered. The objection was overruled. (1044).

Much of the trial was taken up with the discussion of the relationship between Ramos, Jermain and Harris (187-188, 251, 253, 266, 267, 268) and we were then to hear about a relationship between Ramos, Jermain and the aforementioned Earl Simms. (270-272.

There was also much further discussion with regard to a further relationship with co-defendant Morris and various trips to Miami, Cleveland and Detroit. (282, 289, 305, 320, 323, 324, 341).

Suddenly Ramos began a discussion of a Herbert Sperling* Ramos interjected conversations about meeting Sperling and related a conversation which indicated that one of the codefendants had started him off in the narcotics business. (330, 335, 346, 470). Capra's counsel timely objected to the aforementioned conversation as not being in furtherance of anything, and indicated that it was merely done to prejudice the defendant. (471).

Witness Ramos further discussed his relationship with a Rocco Sassone. (351-352, 356, 359).

Sassone was characterized as an unwitting agent of Ramos in carrying out his dirty deeds. Sassone appeared at the trial and testified that he had suspicions that things weren't "shady". However, he maintained that he believed he was involved in transferring gambling money. (1373, 1389, 1390-1391). The record is clear that Mr. Sassone, who is the close associate of Joaquin Ramos knew nothing of defendant Capra. (1389).

Ramos was to further continue mentioning names and discussing individuals that he met during a period of several years. A photograph

* Who was later to appear as a defense witness to vociferously refute the allegation of Ramos. (3307-3457.

of one Willie Middlebrook was placed into evidence as Government's Exhibit "11" (360). Over the objection of Capra's counsel in that it was irrelevant as to the defendant Capra.

Further photographs were introduced through the witness Ramos, specifically Government's Exhibit "16", "17" and "18". (483, 484, 496). An objection was taken as to its relevancy, its materiality and its competence. The photographs were admitted. (482-484, 493).

On re-direct examination, Ramos explained why defendant DellaCava was not in most of the introduced photographs by relating a conversation that the reason for that factor was that he was not to socialize due to his movement of "packages". The aforementioned conversation was objected to as not being in furtherance of the conspiracy, however, this contention was rejected. (984).

Introducing a new aspect to the case, Joseph Conforti took the stand as a confessed narcotics dealer who discussed events that occurred immediately prior to the arrest and indictment of the defendants herein.

He discussed relationships with individuals, Caruso, Spada and Sperling which now moved us from center stage with regard to the Ramos testimony to a period of time in which Ramos was in jail and completely out of the picture. (2399-2638.) Even prior to the testimony of Joseph Conforti, counsel alerted to what Mr. Conforti would testify to* indicated to the Court:

> "Mr. Conforti's testimony is that which would fit into the Kotteakos problem. Certainly he is going to testify about a separate and distinct conspiracy that he alleges commenced from March of 1973 until April, when he was arrested ... he is introducing a separate and new conspiracy into this case as with regard to my client". (2389).

* Pursuant to material received subject to 18 U.S.C. 3500 and his testimony at a prior trial.

The government continued by indicating that a new partner entered into the ongoing conspiracy, that of Herbert Sperling. (2390). The application based on the government's representation was denied. (2391). Various and sundry narcotics paraphernalia was introduced in evidence with regard to the arrest of Mr. Conforti, all over the objection of Capra's counsel with regard to relevancy. In fact, a plethora of "cutting materials was produced before the jury - all related to Mr. Conforti's alleged narcotics "cutting activity". (2451-2472). As to each item, objection was taken by Capra's counsel.

Harvey Tuerack, a special agent for the Drug Enforcement Administration was called to testify and to disclose the facts concerning the arrest of Joseph Conforti on April 14, 1973. (2638-2644). Agent Tuerack went over all of the "Conforti Exhibits" and repeated and reiterated what they were and where they were found. The record discloses that Capra's counsel once again moved for a mistrial due to the "Kotteakos" problem.

> "MR. SLOTNICK: I would join in Mr. McAlevy's objection and I move to strike the testimony of Mr. Conforti as being, again, as I indicated preliminarily, beyond the bounds of the conspiracy presented to this Court, under this indictment and presenting us with a very serious Kotteakos problem, and if the court fails to do that, I would then ask for a mistrial". (2651).

Fortunato Deluca, a New York City Police officer was called to testify on behalf of the government. (2658). He placed photographs before the jury taken in July of 1971, depicting the defendant Capra, together with Herbert Sperling. (2662), all to which counsel objected.

> "...There is no testimony relating to July of 1971 and Mr. Sperling in that area". (2662; See also 2666, 2669-2673).

Gerald Lino, a New York City police officer was called and further continued showing photographs to the jury. (2747-2753). The photographs shown to the jury were taken during October of 1972, a period of time in which there was no testimony regarding Herbert Sperling, Ballentine Barber Shop, or any so-called "sinister" event surrounding the stage delicatessen. (2753-2757). Various counsel objected as being being unrelated, as being prejudicial, as being cumulative, and as certainly not being within the context of the testimony. (2759-2761).

Another special agent of the Drug Enforcement Administration, David Samuel was called to the stand by the government, and he was to discuss the arrest of Steven DellaCava on April 14, 1973. (2769).

He testified that as a result of his arrest of Mr. DellaCava, he received from Mr. DellaCava's person and presence over $14,000.00, together with the gym bag which would ultimately be shown to contain traces of heroin. (2772-2774, 2779, 2825, 2887 - 2888)*

Capra's counsel objected as not being binding upon his client. (2888). Certainly, the record indicated that from January of 1972 there was no relationship between Capra and DellaCava, and suddenly vast sums of money, together with traces of heroin are brought into a trial in which they are alleged to be co-conspirators.

Government chemist Henderson testified with regard to traces of heroin found in a motel allegedly frequented by Joseph Conforti. (2888-2893). Due objections were taken as being out of the conspiracy, unrelated to the defendant, and highly prejudicial. (2892-2893). A lengthy examination was entered into by DellaCava's counsel, 2894-2925), which further amplified to the jury the fact that heroin traces were found with regard to co-defendant DellaCave, who had now been out of

* The findings of Robert A. Henderson, government chemist are consolidated herein.

the picture for over one year. The Court did not, in face of all the objections, give a necessary and proper limiting instruction to the jury.

As the government's case came to a close, there were various and sundry objections based upon the multiple conspiracy theory, requesting that the testimony of Simms be striken as not being binding on Capra, and that a mistrial be granted in view of all the prejudicial material that had entered this trial. (3007-3022)*.

At this point it is necessary to delve into several separate matters of great importance that were introduced at the trial against the defendant Capra:

(a) Standard of living.

> The government attempted successfully to introduce factors with regard to Capra's standard of living and the fact that he lived and appeared to be a man of great wealth - all which was objected to as being prejudicial and not within the charges herein. There was further an attempt to show the standard of living of other defendants which conclusively acted as a diversion from the charges and severely prejudiced Capra. (379-381, 1702-1703, 1713-1758(a), 1680-1688.)

(b) Airline tickets and motel exhibits.

> Government Exhibits 26 through 47 concern themselves with airline tickets and motel receipts of other defendants and co-conspirators spanning a substantial period of time. (1404-1449, 1459-1465.)

The government further introduced with regard to the above mentioned plethora of exhibits, sales contracts indicating that Mrs. Capra had purchased automobiles (Exhibits 51-53 at p. 1412, which apparently stood for no proposition other than the wealth attributed to the Capra family.

* The Court further refused to dismiss the conspiracy as to 4705(a) (3020-3021).

(c) Heroin seized in Toledo. Many kilos of narcotics were placed into evidence. (1748-1749), which were taken from a railroad station in Toledo, Ohio. The defendant had made a pretrial motion to suppress, which was denied by the Trial Judge.*

(d) The Diane Bar tapes.

Detective Eaton testified in conformity with his earlier testimony at the pretrial hearing to suppress the wiretaps.

(2163-2260).** There were additional objections to the introduction of the transcripts (Government Exhibits 75A through S), together with the playing of the tape recording, in that counsel indicated to the court that the witnesses' testimony was the best evidence, and there was no need to have transcript nor the use of tapes. (2178). Nevertheless, the tapes were played and the transcripts handed to the jury. (4018-4025).***

(e) Duplicity.

The defendants were charged in count one with violating Title 26 U.S.C. 4705A, and also Title 21 U.S.C. Section 812. Pretrial objections were made by counsel in their moving

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* The matter of the Toledo suppresion hearing has been fully discussed and briefed in defendant DellaCava's Memorandum of Law presented to this court and we so adopt and join.

** Defendant Capra joins in the facts and points raised by co-defendants DellaCava and Guarino with regard to the tape

*** Defendant Capra specifically wishes to adopt and incorporate by reference the other fact statements regarding the pretrial hearing, the trial and other motions and proceedings in this matter as alleged and recounted by his co-appellants.

This request to adopt and incorporate by reference refers not only to the statements of the co-appellants, but also to the Points of Law as presented in the briefs of defendants Guarino, DellaCava, Jermain, Harris and Morris-naturally, this request pertains only to such facts and law as they pertain to the defendant John Capra.

papers, together with a further objection with regard to the Court's charge, indicating that Count One was duplicitous. (3508-3513).

(f) Charge.

With regard to a concomitant of the conspiracy the Court charged preponderance of the evidence. (3942) and a duly taken objection was made and denied. (3968).

ARGUMENT

POINT I

GOVERNMENTAL ACTION RESULTING IN MASSIVE AND LURID PUBLICITY HAS SO PREJUDICED THE DUE ADMINISTRATION OF JUSTICE THAT THE CONVICTIONS MUST BE SET ASIDE.

The Trial Court found:

> "The events leading to the trial in this case included actions by law enforcement officers resulting in massive and lurid publicity for their activities. The defendants herein were amongst scores taken in a "roundup" in the night and morning of April 13-14, 1973. The numerous arrests were supposedly to be accomplished with the upmost secrecy, yet press reporters and photographers were invited to be present, and it worked, through all the stages of the operation."" Memorandum on Pretrial Publicity, United States of America v. John Capra, et, 73 Cr. 460, Frankel, D.J. (January 8, 1974) p. 11.[1]

The Trial Court determined as a matter of fact that the office of the United States Attorney, the Chief Narcotics Prosecutor, the Assistant who alternatively tried this case, together with various law enforcement officers[2]

1. Reproduced in full in the joint Appendix herein referred to as "App.".

2. New York City Police Department and agents of the Bureau of Narcotics and Dangerous Drugs.

including high officials of said agencies had actively participated in aiding the press with regard to the dissemination of Pretrial Publicity.

> The aforementioned "Memorandum" opinion written by the trial judge detailed the facts regarding the action of top members of the United States Attorney's staff in allowing this case to become so permeated with publicity.[3]
>
> "If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, ... nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. Sheppard v. Maxwell, 384 U.S. 333, 363, 16 L. ed. 2d, 600, 620 (1966). (Emphasis added).

The Trial Court in the nineteen page decision detailed the facts that caused the court "grounds for concern". The Court continued:

> "As for the court itself, "our supervisory power", if it means something, must entail an alert sensitivity to indications

3. "...not omitting high-ranking police officers and top members of the United States Attorney's staff". P. 2. (P.2)-Memorandum on Pretrial Publicity id; See Also - News reports and photos presented to Judge Frankel with regard to the defendants request for a dismissal or, alternatively for a hearing. Specifically Exhibit "H" for identification of the Pretrial hearing held on September 19, 1973 and incorporated as an Exhibit to counsel's letter of December 24, 1973.

> that the federal prosecutor and/or federal law enforcement officers have participated in or quietly, condoned, transgressions against court rules, executive rules, and commands of the Constitution. Memorandum on Pretrial Publicity, United States of America v. John Capra, et al, Frankel, D.J. (1974, p. 6).

After establishing the facts that unquestionably indicate a complete governmental involvement with regard to the dissemination of publicity in this case, the court concerned with a matter that occurred during the trial[4] stated the following:

> "The expectable motion for a mistrial was denied then, as have been other arguments to defeat this prosecution, but matters of this kind may yet take on a more sinister aspect when viewed from some appellate height." id, p. 4.

The court below in the very complete "Memorandum on Pretrial Publicity" found that Rule 8 of the General Rules of the United States District Courts for the Southern District of New York "appeared very possibly to have been violated." (Emphasis added). P. 5. Recently, the United States District Court for the Northern District of Illinois stated with regard to the question touched upon herein:

4. Chemist Roger Fuelster of the Drug Enforcement Administration on redirect examination referred to the "French-connection movie: (243) "(A)...high official was quoted in another press organ as saying the roundup made "The French Connection case look like a pebble compared to a bolder".

"...Sheppard v. Maxwell, ... established the principle that a criminal defendant need only show a probability of prejudicial circumstances to obtain reversal of his conviction. If convictions are to be overturned on a showing that publicity probably affected the outcome, attempts by court rule to forestall such publicity must be judged by the same standard". Chicago Counsel of Lawyers v. Bauer, 14 Cr. L. 2449, 2450 (USDC... N. Ill., 2574). (Emphasis added).

The problem of prosecutorial action as related in this case has apparently been recognized by the Justice Department itself.

"The Department of Justice also has a commendable-founding rule, which might be read to proscribe press briefings and photographic arrangements for 'secret' arrests on serious indictments". Memorandum on Pretrial Publicity, United States of America v. John Capra, et al, Frankel D.J., p. 5; See also 28 CFR Sec. 50.2.

"For Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief that gave it birth ... Under any other rule a Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality". Weems v. United States, 217 U.S. 349, 373, 54 L. ed. 793, 801 (reaffirmed in Brown v. Board of Education, 347 U.S. 483, 492-493, 98 L. ed. 873, 879, 880; also reaffirmed in Estes v. Texas, 381 U.S. 532, 564-565; 14 L. ed. 2d 543, 562-563 (1965).

Judge Frankel in the Memorandum on Pretrial Publicity continued and at page 5 he recognized a possible due process violation.

> "The question of the integrity of the Department's own functioning might have been supposed to cause concern in that quarter, quite apart from the now familiar principle that an agency may deny due process if it fails to obey its own regulations".

Two further factors now enter into the governmental participation in this case:

> (a) the fact that the Justice Department has recognized that this type of conduct should not occur; and
>
> (b) that there is a due process proposition involved with regard to the actions in this case.

The United States Supreme Court has recognized that prejudicial dissemination of news to the media can severely hamper the due process rights of an accused. Sheppard v. Maxwell, 384, U.S. 333, 16 L. ed. 2d 600 (1966); Estes v. Texas, supra; Rideau v. Louisiana, 373 U.S. 723, 10 L. ed. 2d 663, (1963).

In Rideau v. Louisiana, supra, the Supreme Court had before it a record which did not show who initiated the tainted interview. However, it obviously was done with the

active cooperation of law enforcement officers. The court concluded that this publicity was a subtle but no less real deprivation of due process. Nowhere in the majority opinion was there even a suggestion that the community was so permeated with hostility as to make the trial a "hollow formality". Nowhere was there a discussion that adverse publicity faintly infected the trial.

> "In most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process". Estes v. Texas, supra at 473 (Emphasis added).

> "Due process requires that an accused receive a trial ... free from outside influences. Given the persuasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the Trial Courts must take strong measures to insure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances... The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Sheppard v. Maxwell, supra at 362, 363.

Courts have long recognized reality and discarded fiction. Irvin v. Dowd, 366 U.S. 717 (1961); Marshall v.

United States, 360 U.S. (1959);[5] Brown v. Board of Education, supra; In Re Murchison, 349 U.S. 133 (1955);[6] Bruton v. United States, 391 U.S. 123 (1968); Ham v. South Carolina, 409 U.S. 524 (1973); Sheppard v. Maxwell, supra.

In this context the following observations made in 1973 by Rufus King, a Washington, D.C. attorney, is unfortunately real, factual and relevant.

> "Sweeping drug raids and mass arrests always attract special attention from information media. Moreover, enforcement authorities often put out press releases, actively seeking publicity for their feats of detection and apprehension. Thus, the problem of local prejudice against defendants in large drug cases is usually present and often acute. "Defense of a Drug Abuse Case" by Rufus King, as cited in Criminal Defense Techniques, Volumn 3, edited by Sidney Bernstein in Art. 57, P. 36 (1973).

Recognizing the problems inherent in cases like this, the American Bar Association has set forth not only minimum standards for the dissemination of publicity, but also has included disciplinary rules with regard to same. It is contended that the problems inherent in this case are not that of first instance and have been recognized to be improper.

5. In that case the Supreme Court did not consider dispositive the statement of each juror"that he would not be influenced by the news articles, that he could decide the case only on the evidence of record and that he felt no prejudice against petitioner as a result of the articles". At 313.

6. "...our system of law has always endeavored to prevent even the probability of unfairness". At 136.

> "...there are occasions when the inherently prejudicial nature of material, coupled with knowledge of its wide dissemination in the community, requires granting of relief without elaborate soundings of community sentiment". ABA Minimum Standards, Tentative Draft, p. 126. See also People v. Martin, 243 N.Y.S. 2d 343 (1 st Dept. 1963); Delaney v. United States, 199 F. 2d 107 (1 st Cir. 1952); Rideau v. Louisiana, supra.

Certainly, the supervisory power of this court over the proper administration of the Criminal Justice System is without question, Marshall v. United States, 360 U.S. 310 (1959).[7] Furthermore, the Supreme Court in Janko v. United States, 366 U.S. 716 reversing 281 F. 2d 156 (8 Cir. 1960) has recognized the subliminal impact on juries of even a single newspaper item. A procedure employed by the government need not be identifiably prejudicial to be abhorrent to due process for at times it involves such a probability that prejudice will result that it is deemed inherently lacking in due process, Estes v. Texas, supra; Sheppard v. Maxwell, supra; Rideau v. Louisiana, supra.

> "I do not believe its within the province of law enforcement officers actively to cooperate in activities which tend to make it more difficult for the achievement of impartial justice". Rideau v. Louisiana, supra at p. 728.

7. Memorandum of November 27, 1973, United States of America v. John Capra, et al, 73 Cr. 460, Frankel, D.J. Memorandum on Pretrial Publicity, supra, p. 6.

Judge Frankel severely criticized the responses put forth by the office of the United States Attorney[8] and used such phrases and adjectives as "unacceptable"; "disheartening"; "But we must be permitted to hope that resignation to the disaster[9] here described may not be compelled; "Discouraging"; "expected to recur"; "but enough for now from a nisi prius judge, to say that repetitions of such performances, now that the matter has been considered in all its gravity, should lead to sterner and more positive action by the court than mere expressions of disapproval;[10] "...Hopeful that such attention may produce sharper restrictions at the law enforcement sources upon these varieties of press coverate;[11] "unimpressive", "it may be imagined that steps will yet be taken. If they are not, this case may become part of a demonstration that the courts must move against the evil with such remedies as they have available;[12] "...unwilling or unable to clean their own houses"; "Before essaying the cruder and more expensive device of judicial remedies, the court urges that the prosecutor reconsider the stance here expressed".

8. In a Memorandum on Pretrial Publicity, supra, Judge Frankel delineates his comments with regard to the responses given to him by the office of the United States Attorney. At p. 8-16.
9. At p. 12.
10. At p. 14.
11. At p. 14.
12. At p. 16.

"We end the present subject, for this case, at this judicial level, on a note that is not resounding. Defendants have moved to dismiss the indictment or have their convictions set aside because of the publicity extravaganza herein considered. This court, subject to wiser opinions from above, deem such relief excessive and unjustifiable ... it seems fitting to underscore that the mere gnashing of judicial teeth should remain the sole response to such law enforcement behavior ... the time must come when we either surrender our professed rights or enforce them as well as we can ... But the atmosphere and our principles are polluted if the indictment and arrest become the circuses they too often are, complete with prosecutor's press conferences and photographic spreads."[13]

"This court will expect that the response of the United States Attorney to these cautionary reminders will be consonant with the traditions of his great office". Memorandum on Pretrial Publicity, supra p. 17-19.

We are reminded of the following statement as related in Mapp v. Ohio, 367, U.S. 643 (1961):

"The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence".

As dissatisfied as Judge Frankel was with the "circus" together with the responses from the prosecution which appeared to be rather short and unimpressed by the great problem at hand, so the defendants were doubly concerned.

13. At p. 17-18.

Purposeful and active participation in saturating the community by the prosecution must be condemned.

We are reminded of the striking statement in Irvin v. Dowd, supra of the United States Supreme Court when they set aside the conviction and held:

> "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so hugh a wave of public passion ..." 366 U.S. 717, 728.

The entire process and scheme of publicity in this case has been totally unfair to the defendants from the beginning, through the trial and even subsequently thereafter mandate the necessary action by this Court. The Trial Court expressed its disapproval, its concern and left us with a factual situation that demands the condemnation of this prosecution.[14] [15]

In United States of America v. Keogh, 391 F. 2d 138, 148, this court stated:

> "Deliberate prosecutorial misconduct is presumably infrequent; to invalidate convictions in the few cases where this is proved, even on a fairly low showing of materiality, will have a relatively small impact on the desired finality of judgments and will deter conduct undermining the integrity of the judicial system".

14. The publicity Judge Frankel discusses in his Memorandum on Pretrial Publicity merely occurred prior to trial. During the trial several jurors indicated reading an article in The New York Times (Court Exhibit 2), and of the four jurors one said that it was similar to the events at hand (391-408, 416, 428-431). See also: The New York magazine article (Court Exhibit 4 3079-3088) the "Thanksgiving Articles" and the Readers Digest Article concerning the defendants; See Capra's counsel's letter of December 24, 1973 at p. 8 thereof.

15. Defendant Capra adopts and joins in the point as presented to this court by defendant Guarino with reference to prosecutorial misbehavior and indicates that it is applicable to the present point.

mass arrests and the various raids that occurred on the evening of April 13, 1973. Counsel specifically stated:

> "My concern is as to one of Mr. Capra's rights, which was to be arrested without this type of publicity. Again, as I indicate to Your Honor, I have not raised that issue. However, I am very concerned about the fact that there was a New York Magazine, a New York Times man, a Daily News Man, various other people from the media brought there by the Police Department.
>
> I think that they have exceeded the bounds of propriety". (MH303).

The record at this point is totally complete that Capra's counsel had no idea nor did anyone with regard to the defense of this matter know that the mass media were brought to the Capra household by and under the auspices of the New York City Police Department and the Drug Enforcyment Administration. Capra's counsel further indicated:

> "As has been suggested by other counsel, there is an issue at this point now of harrassment, provocation, the propriety of the arrest. The police brought these people there ... I would also like to find out, because again, the novelty of the issue is not the publicity issue but the propriety of the police and agents exhibiting this type of conduct. Somewhere in the back of my mind it suggests to me that there is some sort of violation of his rights to have this thing occur.

The findings of fact by the court below could only reach to the positive conclusion that this conviction must be set aside.

POINT II

EVIDENCE RECEIVED BY THE GOVERNMENT TO BE USED AGAINST THE DEFENDANT JOHN CAPRA WAS INADMISSIBLE AND SUPPRESSIBLE DUE TO THE FACT THAT IT WAS THE PRODUCT OF A PRIMARY UNLAWFUL ACT AND THE INDICTMENT WAS OBTAINED THROUGH THE EXPLOITATION OF THAT UNLAWFUL ACT

THE DIANE BAR WIRE TAPS

This point is addressed to the fact that the identity of John Capra was learned through a series of unauthorized listenings or illegal overheards[16] specifically occurring during December 23, 1971, and thereafter, with regard to conversations he had with Steven "Beansy" DellaCava, at phone number 722-9595.

The aforementioned public phone located at Diane's Bar only authorized the interception of conversations of Joseph DellaValle speaking to others.[17] However, as the record relates, the police listened to all of the conversations of Steve "Beansy" DellaCava - even after the "sudden" discovery that he was not the proper party to be listened to. (December 19, 1971).

Evidence against the defendant Capra, gathered since December 23, 1971, was inadmissible and should have been suppressed due to the fact that it was the product of a primary unlawful act on the part of State officials, and as a result thereof, the indictment

16. Appellant Capra respectfully adopts and incorporates by reference the arguments raised by co-appellants with regard to the "unauthorized" listening, also referred to as the warrantless taps; the lack of proper notice and the failure to minimize.

17. The records of this case conclusively indicates that the monitoring officers, the assistant District Attorney and the Chief Officer in charge of this wiretap, knew, believed and were instructed only to listen to conversations in which Joseph DellaValle was a party thereto.

was tainted; due to the fact that it was obtained as a result of the exploitation of the aforesaid unlawful act on the part of the government. Wong Sun v. United States, 371 U.S. 471, Silverthorne Lumber Co. v. United States, 251 U.S. 385; Nardone v. United States, 308 U.S. 338, 340-341; Benanti v. United States, 355 U.S. 96, 103; Elkins v. United States, 364 U.S. 206, 217; Mapp v. Ohio, 367 U.S. 643, 648; Harrison v. United States, 392 U.S. 219, 222; Alderman v. United States, 394 U.S. 171, 177; Bell v. Hood, 327 U.S. 678, 684; Bivens v. Six Unknown Federal Narcotics Agents, 406 U.S. 388, and most recently Koutnik v. John Murphy et al, (App. Div. 2d Dept.), NYS 2d (March 14, 1974)- People v. Robinson, 13 NY 2d 296 is cited approvingly.

> "In a government of laws, existence of the government will be imperiled if it fails to observe the laws scrupoulsly. Our government is potent, the omnipresent teacher for good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breads contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the ends justify the means .... would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face. Olmstead v. United States, 277 U.S. 438, 471, 485 (1928). (Dissenting opinion).

On December 23, 1971, Detective George Eaton intercepted a conversation knowing that he had no judicial authority to listen to that conversation[18]. As a result of the aforementioned illegal overheard, the hearing developed that there was the primary and initial discovery of John Capra which led to the investigation herein., the indictment and evidence at the trial..

18. Again, it is pressed that all of the parties concerned knew that the original warrant contained authority only to listen to conversations of Joseph Dellavalle:

Mr. Justice Douglas concurring in Gelbard v. United, supra so eeloquently stated:

> "Moreover, when a court assists the government in extracting fruits from the victims of its lawless searches, it degrades the integrity of the judicial system ... The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions ... should find no sanction in the judgment of the courts ... Rather, ... Judges are being invited to become the hand maidens of intentional police lawlessness by ordering these victims to elaborate on their telephonic communications of which the prosecutors would have no knowledge but for their unconstitutional surrevillance. (Emphasis added); See also Kouthik v. Murphy, supra

Mr. Justice Douglas, in the Gelbard decision again shows great insight into occurrences such as those underlining the indictment in United States v. Capra:

> "We are told that police are often tempted to make illegal searches during the investigations of a lodged conspiracy. Once the police have established that several individuals are involved, they may deem it worthwhile to violate the Constitutional rights of one member of the conspiracy (particularly a minor member) in order to obtain evidence for use against others ... The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and forced confessions ... should find no sanction in the judgment of the courts ..." 92 S. Ct. 23 (1972) (Concurring).

It is clear that 18 U.S.C. 2518 gives standing to defendants to suppress the contents of any intercepted wire or oral communication, "or evidence derived therefrom ..." (Emphasis added), United States v. Gelbard, 92 S. Ct. 23, 57 (1972). Note: Similarly, seeeSection 700 CPL et seg; 4th Amendment United States Constitution.

Section 2518 states (10)(a):

> "Any aggrieved person in any trial, hearing ... or before any Court ... may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom on the grounds that (i) the

communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval."

The very record placed before this Court clearly indicates that Capra had been "found" as the result of an initial unlawful intrusion upon his conversation-with another individual both of whom were not to have been listened to by the Government - all that followed was the "fruit" of such unlawful activity.

It is impossible for the Government even to begin to carry its burden of dissipating the taint when its own papers make the complete admission that this investigation as to Capra commenced as a result of the taint that flowed from the December 23rd conversation.[19]

The matter of discovery of Capra and the resulting surveillance of DellaCava's trip to Ray's Stationery Store is of the utmost importance. For, without the initial illegal intrusion and the leads that followed from the illegal overheards of Diane's Bar, Detective Eaton would not have discovered and investigated the defendant Capra.

The Supreme Court has recognized that the mere discovery of a person's identity is a crucial aspect of the invasion of privacy which Title III of the Omnibus Crime Control and Safe Streets Act of of 1968, 82 Stat. 211, as amended, 18 U.S.C. §2510-2520,[20] seeks to prevent. Thus, in the Gelbard opinion, which is so crucial to the case at bar, the Court, - noting Congress' "concern with the protection of privacy of communications ... [which] is to be protected" -

19. Alternatively, in view of Capra's and DellaCava's affidavits that Capra was an undisclosed owner and apparent officer of Diane's Bar, based upon the principles set forth in Alderman v. United States, 394 U.S. 165, 176-80 (1969) he is to receive the benefit of all the illegalities and taints that occurred on the Diane's Bar wiretaps.

20. The New York Statute CPL Sec. 700 et seg. is also on point.

"The proposed legislation is intended to protect the privacy of the communication itself ... S. Rep. No. 1097, 90th Cong., 2d Sess., 90 (1968) U.S. Code Cong. in Admin. News p. 2178".

As defined in Title III "contents" when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport or meaning of that communication itself. No aspect, including the identity of the parties, the substance of the communication between them, or the fact of the communication is excluded. The privacy of the communication to be protected, is intended to be comprehensive.
S. Rep. No. 1097, supra, at 91, U.S. Code Cong. in Admin. News, page 2179". Gelbard v. United States, 92 S. Ct. 2357, 2363-64, 408 U.S. at 41, Footnote 10.

It is to be noted that in United States v. Huss, supra, this Circuit Court of Appeals, in Chief Judge Kaufman's Opinion (Slip. Op. at page 17) added the above emphasis.

Courts have consistently dismissed indictments based on illegal "discovery" by the government. Smith v. United States, 120 U.S. App. D.C. 31, 344 F 2d 545 (1965); United States v. Tane, 329 F. 2d 848 (2d Cir. 1964); United States v. Coplon, 185 F. 2d 629 (2d Cir. 1950) (if police "had been set on the [defendant's] trail" by wiretapping, the entire prosecution vitiated); People v. Dentine, 21 N.Y. 2d 700, 287 N.Y. Supp. 2d 427, 428-430, 234 N.E. 2d 462 (1967) (Fuld, J., dissenting); cf. United States v. Hagarty, 388 F. 2d 713 (7th Cir. 1968) (electronic surveillance). See also Broeder, Wong Sun -- A Study in Faith and Hope, 42 Neb. L. Rev. 483, 523 (1962); See also People v. Martin, 382 Ill. 192, 46 N.E. 2d 997 (1942). CF. Williams v. United States, 382 F. 2d 48 (5th Cir. 1967).

Similarly, in United States v. Schipani, 289 F. Supp. 43 (U.S.D.C., E.D.N.Y., 1968), Judge Weinstein noted the importance of the very discovery of a person's identity in instigating and aiding

> "If illegally secured information leads to substantially intensify an investigation, all evidence subsequently uncovered has automatically "been come at by exploitation of that illegality". The unlawful search has set in motion the chain of events leading to the government's evidence. And there has then been "a continuing ... [and] significant participation by prosecution officials" from the time of the police misconduct to the time of the discovery of the evidence. Ruffin, Out on a Limb of the Poisonous Tree; The Tainted Witness, 15 U.S.C.A. L. Rev. 32, 38 (1967). The road from the tap to the testimony may be long, but it is straight". United States v. Tane, 329 F. 2d 848, 853 (2d Cir. 1964). See also Maguire, Evidence of Guilt 246 (1959) ("exclusion of evidence about secondary discoveries made possible solely or facilitated by the original violation").

The Fourth Amendment prohibits all use of evidence obtained through the illegal use of wiretaps. The Amendment's protections would indeed be hollow if the Government could use the fruits of that evidence at will. To allow such practices would be to encourage the Government to do indirectly what the Constitution prohibits from doing directly. Silverthorne Lumber Co. v. United States, supra; Nardone v. United States, supra; Alderman v. United States, 394 U.S. 165, 171-172, (1969); Weeks v. United States, 232 U.S. 383, 390; Mapp v. Ohio, 367 U.S. 643, 659.

The acts of the detectives in their unauthorized listening to the Capra conversations represent an attempt to circumvent the dictates of the exclusionary rule. As Justice Holmes states:

> "It is desirable that criminals should be detected, and to that end, that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained ... For my part, I think it less evil that some criminals should escape than that the government should play an ignoble part". 277 U.S. 438, 470 48 S. Ct. 64, 675 (1927) dissenting. See also McNab v. United States, 318 U.S. 332 (1943) and Kerry v. Ohio, 392 U.S. 1 (1968).

It will be needless for counsel to continue to discuss the very essence and importance of protection of the right of privacy. However, we are constrained to reiterate the dictates of the United States Supreme Court in Berger v. New York, 388 U.S. 41 (1967):

> "We cannot forgive the requirements of the Fourth Amendment in the name of law enforcement". (At page 62-63).

This Court stated in United States v. Paroutian,[22] 299 F. 2d 486 (1962):

> "For in the circumstances the agents willfully or negligently ignored judicial admonitions, constantly reiterated, that each one of us, suspected criminal or no, is entitled to security in or persons, houses, papers and effects until an impartial Magistrate determines that the enforcement officers have probable cause to believe the law has been violated ...
>
> On the other hand, a showing that the government had sufficient independent information available show that in a normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy ... The test must be one of actualities, not possibilities". 488-489.

We severely critize the reasons alleged by Assistant District Attorney Fishman for not receiving a warrant with an Amendment to include Steve "Beansy" Della Cava. United States v. Deberry, decided November 7, 1973 (2d Cir.) Docket No. 73-1283, 1353, Slip Op. at 5571; Ventresca v. United States, 380 U.S. 102 (1965).

As Judge Weinstein related in United States v. Schipani, 289 F. Supp. F. 43 (1968):

> "In the case before us a more appropriate simile than the enclosed "Fruit of the Poisonous Tree" is, perhaps, that of a tree nourished by both pure and polluted waters. In this Circuit, the tendency has been confined to

22. A narcotics case involving heroin.

any appreciable pollution sufficient to taint the fruit. See United States v. Paroutian, 299 F. 2d (486) 2d Cir. 1962).

"If the evidence is discovered as the result of both legal and illegal leads, it is inadmissible. It does not matter that the legal lead would itself probably have suffice to uncover the evidence. As the Court of Appeals for this Circuit declared, it is not sufficient for the government to show that "in the normal course of events it might have discovered the questioned evidence without an illegal search ...", at p. 154.

Furthermore, a warrantless search is per se unreasonable. Berger v. New York, 388 U.S. 41 (1967); Coolidge v. New Hampshire, 403 U.S. 443 (1971). The fundamental principal is that all searches should be made with a search warrant. It does not matter in the least that probable cause to obtain a search warrant existed in super abundance. Jones v. United States, 357 U.S. 496, 500; Berger v. New York, supra, Katz v. United States, 389, U.S., 389, U.S. 347 (1967).

Commenting on Osborn v. United States, 385 U.S. 323, where the intrusion ended after one necessary conversation was obtained, the Court, in Berger said, "no greater invasion of privacy was permitted than was necessary under the circumstances". Supra, at 57. Discreption was improperly placed in the hands of the police (Marron v. United States, 275 U.S. 192 (1927); United States v. Dzialak, 441

F. 2d 212 (2d Cir. 1971); United States v. Highfill, 334 F. Supp. 700; E. D. Ark., 1971; then, A Fortiori, an eavesdropping search made pursuant to an order that delineates only authority in a limited scope is defective when it leaves that limited scope. Discretion is not left with regard to the search to the Police. In Marron, supra, the Supreme Court said that nothing should be left to police authority; In Dzialak, supra, the 2d Cir. suppressed all items seized, even though some were seized within the scope of a valid warrant; and in Highfill, supression was ordered when the police continued to search after they had seized the item listed in the warrant.

With regard to the conversations received by the Diane Bar No. 2 eavesdropping warrant, we contend that probable cause cannot be made upon the fruits of an illegal search. United States v. DiRe, 332 U.S. 581 (1948); Johnson v. United States, 333 U.S. 10 (1948); Henry v. United States, 361 U.S. 98 (1959).

The affidavits for the renewal and amended search warrant for the Diane's Bar public telephone was based upon false reasoning, errors and illegalities received as a result of the "uninvited ear of the police".

Nevertheless, the conversations of Capra over the Diane's Bar telephone were intercepted, seized and played for the jury. (2170-2256).

At a minimum, those conversations should have been suppressed and not presented to the jury[23] in the substantial light that they were.

23. It is to be noted that one of the Exhibits requested by the jury was the aforementioned transcript of all the conversations transcribed.

MINIMIZATION AND OTHER DEFECTS

Specifically, the December 23, 1971 conversation of the Defendant Capra should unquestionably not have been listened to by the police (see point above) - a further reason is the fact that they were required to minimize pursuant to the Court order. Detective Eaton testified that conversation contained a long pause and resulted in perhaps an eight to ten minute[25] interval - that was his testimony. At the time that Della Cava called Capra on December 23, 1973, the following factors were relevant: (a) Eaton knew he was not listening to DellaValle, the only individual he was authorized to listen to. (b) The District Attorney has been notified about DellaCava several days before; (c) he realized that the party on the other end was not going to be DellaValle, but either "Leo or Johnny Hooks".

The mere conclusion is that that conversation should not have been listened to. The dictates of the issuing court were not followed - aside from the illegal unauthorized overheards, the minimization context with regard to Capra's conversations were totally betrayed. Being an unreasonable execution of the warrant, the interception of conversations subsequent to December 19, 1971, is controlled by Marron v. United States, supra, which was cited approvingly in Berger v. New York, 388 U.S. 41 (1927).

The record makes it apparent that there was no supervision by a neutral Magistrate during the course of the interceptions on the Diane Bar wiretaps.; Cf. United States v. Bynum, (9/24/73, 2d Cir. 1973). The Court stated:

24. Capra joins in the other points with regard to lack of minimization, lack of notice as raised by the other appellants.

25. In actuality the call was apparently over four minutes.

"In our view, the degree of judicial supervision is an important factor in determining whether a good faith effort to minimize was attempted". United States v. Bynum, supra, at 21.

In the overview of this case, the warrants and taps are interrelated and run for approximately one and one-half years. The extensiveness of the Court authorizations are alarming - in at least one instance, the police were allowed to continue their invasions for approximately four months.[26]

The Supreme Court in Berger v. New York, 388 U.S. 41 (1967 condemned a sixty day tap and indicated that they would not approve prolonged electronic surveillance.

18 U.S.C. §2518 (5) states:

"No order entered under this Section may authorize or approve the interception of any wire or oral communication for any period longer than necessary to achieve the objective of the authorization". (Cf. C.P.L. §700.10).

The reason for the statutory language is to limit the search to the least possible intrusion.

An invasion of privacy is not to be permitted longer than necessary. Berger v. New York, supra at 57.

Discretion was improperly placed in the hands of the police. See Marron v. United States, supra; United States v. Highfill, supra; and United States v. Dzialak, supra.

Recently, the Eastern District in United States v. Vega, 52 FRD 503 (1971) invalidated a New York Supreme Court order due to its breadth and lack of particularity with regard to the communications to be seized. See also People v. Fino, 29 A.D. 2d 277 (4th Dept. (1968),

26. Even though the conversations from that electronic surveillance were not introduced or referred to at the trial, it is certainly germain - we are referring to the wiretap of "Ray's Stationery Store".

aff'd. 24 N.Y. 2d 1020. District Courts have suppressed evidence received as a result of the eavesdropping orders where the orders permitted continuous interceptions beyond the attainment of the objectives of the order. United States v. Todaro, Cr. 1970 - 142 and United States v. Joseph, (Cr. 1971-2) SDNY).

A court authorized eavesdropping warrant should limit the search to the attainment of its objectives. People v. Gieri, 69 Misc. 2d 1085.

There is a statutory, constitutional and judicial obligation to supervise the invasion of privacy. The invasions, as occurred here, were too extensive, too broad and too permissive.

POINT III

ALL EVIDENCE SEIZED IN TOLEDO, OHIO AND UTILIZED AT THIS TRIAL MUST BE SUPPRESSED

Pursuant to Federal Rule of Appellate Procedure (28)(i), appellant respectfully incorporates by reference the arguments and facts raised by co-appellants on this issue.

POINT IV

THE CUMULATIVE PREJUDICE OCCURRING THE TRIAL WITH REGARD TO THE DEFENDANT CAPRA MANDATES A REVERSAL OF HIS CONVICTION

DUPLICITY

The first count of the Capra indictment charged a continuing conspiracy from July, 1969 through the date of the indictment to violate Section 4705(a) of Title 26 and Section 812 of Title 21.

The remedy for duplicitous joinder of offenses is governed by Rule 14 of the Federal Rules of Criminal Procedure. The proper remedy would be to require the government to elect, upon which charge contained in the count it will rely upon - and the defendant would not have been harmed if the proof was limited to only one of the charges in the duplitious count. United States v. Gibson, 310 Fed. 2d (79) 2d Cir. 1962).

However, in this case the Trial Court refused to cause the government to elect and in plain error charged a "fiction", together with the "new law". It is indicated to this Court that the charge with regard to Count I of the indictment was extremely cumbersome and confusing to the jury, and that defendant should not have been caused to stand trial on the duplitious count.

MULTIPLE CONSPIRACIES AND
MULTIPLE DEFENDANTS

The many facited problems relating to this trial factually, is related in our statement which should be taken together with the other statements of the other co-defendants to indicate that a severe "Kotteakos" problem existed, 328 U.S. 750 (1946).

Wealth of various and sundry unconnected defendants was exhibited before the jury - without proper limiting instructions. The standard of living of several of the defendants was paraded before the jury which in and of itself was severely prejudicial to the defendant-whose assets was shown - moreover, the cumulative effect of the various luxuries arising from different defendants was devastating.

There was also many conversations introduced into evidence which likewise did not receive proper limiting instructions (304, 313-316, 2239, 2243-45, 2308). The failure and refusal of the Trial Judge

to give limiting instructions at the time that the aforementioned evidence was received was reversable error. Nash v. United States, 54 F. 2d 1006 (2d Cir. 1932). See also Lutwak v. United States, 344 U.S. 604, 619 (1953); Green v. United States, 386 F. 2d 953, 957 (10th Cir. 1967. The factual analysis of this trial should be sufficient to indicate to this Court that Capra should have been judged upon his individual guilt or innocence, rather than upon the cumulative and prejudicial evidence.

SEVERANCE

At the Pretrial motion, defendant Capra, in his application for a severance indicated to the Court the following:

> "... Due to the ... prejudice that would flow by a joinder of co-defendants for trial together, he requests a separate trial of this indictment. ... The trial will contain statements of co-defendants (electronically recorded or otherwise) which would be of such a highly incriminating nature that no purpose could be served in causing the defendant Capra to stand trial together with all of the co-defendants - other than to prejudice and further taint the government's case against the defendant Capra ... The defendant Capra further indicates that he has reason to believe that there will be a severe Bruton problem ... misjoinder as to the counts and the defendants ...
>
> It is contended that the trial will involve several conspiracies, different jurisdictions and diverse issues, all which will deny the defendant Capra his due process rights to a fair hearing. Also, it was improper to join the defendants whereby testimony may come in alleging offenses committed by others not involving defendant Capra and outside the conspiracy". Capra's application for severance September 5, 1973 at p. 50-51.

The defendant further raised the issue of "taint", conflicts between and among the defendants and ultimate prejudice.

"...As there is no dispute but that such statements, ... were of a highly incriminating nature ... they were not only incriminating as to the defendant by whom made but in the main, equally incriminating against other defendants. True, as the government asserts, such statements were offered in evidence against the defendant by whom made, and the Court instructed the jury accordinly. A reading of these statements, however, leaves no room for doubt, but that they were damaging not only as to the defendant against whom offered, but as to all others. We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effects of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter, could perform such a herculean feat". United States v. Haupt, 136 Fed. 2d 651, 672 (7th Cir. 1943). See also, United States v. Spector, 326 F. 2d 345, 7th Cir. 1963); Deluna v. United States, 308 F. 2d 140, 141 (5th Cir. 1962), re-hearing denied 324 F. 2d 375 (1964).

Due and timely application was made for severance, which was denied.

Capra was faced with an additional problem that substantial sums of money, together with traces of heroin will be brought in against the defendant DellaCava - at a time when his association with Capra apparently dissapated. The Court's failure to deliver a proper limiting instruction with regard to the damaging traces of heroin, together with the substantial sum of money that found itself in the "gym bag" was obviously used against Capra without even his participation being testified-to-by his relationship with DellaCava being proven to have continued to that time.

As a result of the pre-existing relationship between DellaCava and Capra, the jury could have inferred that this was part of a continuing relationship. Prejudice as a result of these factors annured to the detriment of defendant Capra. United States v. Russano, 257 F. 2d 712 (2d Cir. 1958); Kotteakos v. United States, supra.

Photographs, airline tickets, motel receipts, installment purchase contracts, were all admitted in evidence - after they were testified to. The attempt to bolster testimony with regard to the presentation of the various exhibits - almost all of which did not relate to the defendant Capra was improper. Wharton on criminal evidence, 12 ed. Sec. 673 at p. 612.

A second effort at a severance was made by the defendant Capra on October 16, 1973 by his counsel who wrote the trial judge the following letter:

> "Honorable Sir: we have been informed that certain statements of Steven Della Cava will be introduced in evidence on the trial.
>
> We respectfully request that the defendant's motion for a severance be further adjudicated on the basis of the above information. Respectfully submitted, Barry Ivan Slotnick, on behalf of defendant Capra".

As the statement of fact presented by the various appellants indicate many motions for mistrial were made due to the combination of events at the trial causing prejudice.

CHARGE

The Court charged "if a jury finds from a preponderance of the independent evidence as to each individual.are all members of a conspiracy, then the acts or declarations of A, even in the absence of B and C, may be taken as evidence against B and C ..." (3942).

Proper objection was taken through the erroneous charge which replaced the standard of reasonable doubts with a perponderance of the independent evidence. The court refused to amend his charge.

(3968). Specifically, after the Court charged the jury, the following occurred:

"THE COURT: All right, exceptions.

MR. SLOTNICK: Yes, Your Honor ... I object to Your Honor's charge of preponderance of evidence when he was charging that if they find by a preponderance of the evidence A, B, and C were members of the conspiracy, that should be a reasonable doubt charge...

THE COURT: ... All of those exceptions are overruled".

POINT V

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 28(i) APPELLANT CAPRA RESPECTFULLY INCORPORATES BY REFERENCE ANY FACTS AND ARGUMENTS RAISED BY CO-APPELLANTS INSOFAR AS THEY ARE APPLICABLE TO HIM

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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New York, New York 10038
(212) 233-5390

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of March , 1974 at No. FOLEY SQUARE deponent served the within BRIEF upon U.S. ATTORNEY the APPELLEE herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the atty. for appellee therein.

Sworn to before me,
this 20 day of March 1974

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975